United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original w/ affidavit of mailing

75-1052

To be argued by
ALVIN A. SCHALL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1052

UNITED STATES OF AMERICA,
Appellant,

—against—

TOMMY ROBERTS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ALVIN A. SCHALL,
Assistant United States Attorneys,
Of Counsel.

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ARGUMENT

POINT I

Reply to Point I of Appellee's Brief.

(1)

Appellee asserts that the Government "misleads the Court" by arguing that the Sixth Amendment guarantee of a "speedy . . . trial" does not mean that a defendant is entitled by that clause to a speedy sentence upon a plea of guilty. Appellee bases his contention on the assumption that "the speedy trial right includes the right to a speedy sentence (Brief, 6)." In support of this assumption, appellee places principal reliance on the case of *Pollard* v. *United States*, 352 U.S. 354 (1957), where, prior to rejecting a speedy trial claim based on delay in sentencing, the Supreme Court said, at 352 U.S. 361:

> "We will assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment."

The Government respectfully submits that appellee's position is in error. To begin with, the language quoted from *Pollard* is merely dicta, as emphasized by the word "*arguendo*" appearing in italics. It can in no way be regarded as a determinative ruling or holding.* Most importantly, however, no case cited by appellee lends support to the proposition that where there is delay in sentencing, the defendant is entitled to the "unsatisfactorily severe" Sixth Amendment remedy of dismissal of the indictment. See *Barker* v. *Wingo*, 407 U.S. 514, 522 (1972).** In fact, the contrary is true. In *United States* v. *Tortorello*, 381 F.2d 587 (2d Cir. 1968), one of the cases relied upon by appellee, this Court stated:

> "On this appeal appellant complains of the delay between plea and sentencing. He recognizes that because he pleaded guilty, it would not be appropriate to remedy the delayed sentence by dismissing the indictment. The Supreme Court has rejected the

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* It is instructive to note that in *Pollard* the Court also stated, at 354 U.S. 361:

> "Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances. [citations omitted]. The delay must not be purposeful or oppressive."

In the "circumstances" of the case at bar where the Government and the defendant had entered into an agreement as to a disposition and where Judge Travia was involved in the *Bernstein* trial, it can hardly be said that the delay was "purposeful or oppressive." See also *United States* v. *Grabina*, 309 F.2d 783, 786 (2d Cir. 1962), *cert. denied*, 374 U.S. 836 (1963).

** In *Smoker* v. *Russell*, 218 F. Supp. 899 (M.D. Pa. 1963), and *United States ex rel. Giovengo* v. *Maroney*, 194 F. Supp. 154 (W.D. Pa. 1961), two cases relied upon by appellee, it was found that there had been undue delay in sentencing in the state courts. Accordingly, the two habeas corpus petitioners were ordered discharged from custody. Contrary to the position urged by appellee in support of the District Court's ruling, however, there was, in neither of these cases, a dismissal of the underlying indictment.

> 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed error in passing the sentence.' In *re Bonner*, 151 U.S. 242, 260 (1894). Cf. *Bozza* v. *United States*, 330 U.S. 160 (1947)."

Appellee raises three additional arguments for applying the speedy trial doctrine of the instant situation: first, the possibility that a defendant intending to plead guilty might change his mind or that the judge might refuse to accept his plea, presumably thus necessitating a trial; second, the chance that a delay in sentencing might hinder the imposition of a concurrent sentence with any other sentence being served; and third, "the psychological and financial effects of the long-term pendency of criminal charges (Brief, 8)." Whatever may be said of them in general, however, none of these considerations is relevant in the circumstances of this case. The inalterable characteristic of this case is that it does not now involve, nor has it ever involved, the prospect of a trial. There was to be no trial. The parties had agreed upon a disposition. Appellee was to plead guilty and was to cooperate with the Government. In these, the relevant "circumstances" of this case, *Pollard* v. *United States, supra*, 352 U.S. at 361, the Sixth Amendment remedy of dismissal of the indictment is hardly appropriate, even if we assume, *arguendo*, that the clause has application to an unavoidably delayed plea or sentencing.*

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* Carried to its logical end, appellee's argument would mandate dismissal of the underlying indictment in the situation where there was a delay in executing a sentence. It does not appear that such an approach has ever been even remotely contemplated by the courts. Accordingly, the mere delay in execution of sentence provides no basis for relief from the sentence, much less relief from the stigma of guilt. See *United States* v. *Vann*, 207 F. Supp. 108, 113 (E.D.N.Y. 1962); *Pinkerton* v. *Steele*, 181 F.2d 536 (8th Cir. 1950); *Scott* v. *United States*, 434 F.2d 11, 23 (5th Cir. 1970).

(2)

In applying the tests of *Barker* v. *Wingo* to the facts of this case, appellee makes several arguments.

It is claimed, in response to the Government's contention that appellee has gained the benefit of not having to stand trial on a felony indictment, that "this cooperative defendant . . . might have been better off with [a] felony conviction later expunged than a permanent misdemeanor conviction (Brief, 10)." Appellee also asserts that the Government failed to make clear to him what the consequences of his intended plea would be. Both of these arguments are without merit. To begin with, by the very facts, appellee would not have been a "cooperative defendant" if he had stood trial and been convicted on indictment 73 Cr. 884. Not only would he thus have been found guilty on at least one and, possibly, ten felony counts, but there would also have been lacking any kind of statement on his behalf from the Government at the time of sentencing. It is mere conjecture to argue that under these circumstances appellee would have received the benefit of Youth Corrections Act treatment. In addition, it is hardly fair to claim that the Government failed to apprise appellee of the consequences of the disposition plan. In the first place, the plan was spelled out to appellee in October of 1973, and he accepted it. Once this was done, we fail to see how it was the duty of the Government to be cognizant of, and watchful over, such unique interests of the appellee as the possibility that he might be sentenced under the Youth Corrections Act. On the contrary, this was the responsibility of the Legal Aid Society, the party that was representing him.

At the same time, in his brief, appellee gives scant attention to his failure to assert the speedy trial right prior to November of 1974. In so doing, he ignores the Supreme Court's command that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* v. *Wingo, supra,* 407 U.S. at 532.

In addition, appellee seeks to minimize the importance of his agreement with the Government. He attempts to do this by arguing that he could not have known in October of 1973 that the final disposition of his case would be delayed by Judge Travia's involvement in the *Bernstein* trial. He also contends that it was unknown to him whether or not the Government would have altered the terms of the disposition upon his request, suggesting that he lacked any leverage to compel the Government to honor its agreement with him.

Again, appellee's contentions are without merit. In the first place, although it could not have been foreseen in October of 1973 that the *Bernstein* trial would continue until the following July, the Legal Aid Society, based on its daily appearances in the Eastern District, was certainly in a position to know that the *Bernstein* case was consuming Judge Travia's time and preventing him from reaching other matters on his calendar.* Furthermore, both appellee and his counsel could see that time was passing and that appellee was approaching his 26th birthday. Faced with these circumstances, however, neither appellee nor Legal Aid did anything; instead, they both waited until it was too late.

Appellee's explanation for his failure to go to the Government with his alleged concern over Youth Corrections Act treatment simply does not bear realistic scrutiny. Obviously appellee could not have known what the Government would have said if he had raised the issue. The point is, however, that he did not give the Government a chance to respond one way or the other. And it is not the Govern-

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* In fact, in a footnote on page 4 of its brief in *United States* v. *Drummond*, 74-2264, — F.2d —, Slip opinion 1781 (2d Cir. Feb. 11, 1975), Legal Aid specifically noted that two of its cases, *United States* v. *Cowley*, 73 Cr. 653, and *United States* v. *Galindo-Valdez*, 73 Cr. 853, had been reassigned from Judge Travia to other judges.

ment who should now be penalized because of appellee's failure to act. Although the two parties were not, in the most literal sense, "on the same side"—and the Government has never so contended—they were in fact in a non-adversary relationship, no longer poised for, and looking towards, a confrontation at trial. It was in the interest of both the Government and appellee to work together. What the Government had to offer, and what appellee had accepted, was a plea to a reduced charge, while appellee, contrary to his present claims, had on his side the factor of his co-operation as a bargaining tool.

The irrefutable fact is that the appellee and the Government had entered into an agreement as to the disposition of this case. In the face of this agreement, appellee cannot be now heard to complain because he failed to appropriately and timely raise the issue of Youth Corrections Act treatment.

POINT II

Appellee Has Not Been Denied Due Process.

Appellee asserts that the delay in disposing of his case has denied him due process. In support of his contention, he cites *United States* v. *Marion*, 404 U.S. 307 (1971), and seems to argue that somehow he has been treated unfairly by the Government.

In *Marion*, faced with the claim that the defendants had been denied a speedy trial because of alleged delay in indicting them, the Supreme Court established the rule that the speedy trial provisions of the Sixth Amendment have no application until a person becomes an "accused" by being arrested or charged. 404 U.S. at 318. The Court also pointed out, however, that the due process clause of the Fifth Amendment would have required dismissal of the indictment if it had been shown that pre-indictment delay

had caused "substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States* v. *Marion, supra,* 408 U.S. at 325. See also *United States* v. *Ferrara,* 458 F.2d 868 (2d Cir.), *cert. denied,* 408 U.S. 931 (1972).

Clearly, appellee's reliance on *Marion* and any due process argument is misplaced. In the first place, appellee suffered no prejudice at all in terms of his right to a "fair trial." Quite simply, there was never to be a trial. Most importantly, however, the Government has in no way acted improperly in this case to gain a "tactical advantage" over appellee. On the contrary, the Government has at all times been open and fair. At the very outset, in October of 1973, when the disposition plan was offered, appellee was told that he could not plea to the misdemeanor until after the Smith prosecutions were completed. Nothing was hidden. Appellee was offered terms which he was free to accept or reject; he accepted them. Contrary to the claims of appellee, the Government had no interest in delaying the completion of the Smith trials or any other cases. After the completion of the *Bernstein* case and Judge Travia's resignation, the Government was able to agree upon a disposition with the Smiths. If this had been possible sooner it would have been done; stale prosecutions are certainly of no benefit to the Government. The point is that appellee was told that the disposition of his case was tied to the Smith prosecutions. He knew this at the outset, and he never once complained of the wait which ensued after his discussions with the Government. Clearly, in the circumstances of this case, appellee has not been denied due process.

CONCLUSION

The Order of the District Court should be reversed and the indictment should be reinstated.

Dated: March 11, 1975

Respectfully submitted,

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COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 11th day of March 1975 he served ~~a copy~~ two copies of the within

Reply Brief for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
11th day of March 1975

Martha Schaaf

MARTHA SCHAAF
Notary Public, State of New York
No. 24-3460330
Qualified in Kings County
Commission Expires March 30, 1975